Supreme Court, U. S.
FILED
JAN 16 1980
JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

79-931

LLOYD L. HAYES, HAYES, INC., PARK PLAZA TWIN THEATRES, INC. and MID-COUNTY ENTERPRISES, INC.,

Petitioners,

v.

T.G. SOLOMON, GULF STATES THEATRES, INC., GULF STATES THEATRES OF TEXAS, INC. and FUQUA INDUSTRIES, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

Of Counsel:

CAHILL GORDON & REINDEL
80 Pine Street
New York, New York 10005

JACKSON, WALKER, WINSTEAD, CANTWELL & MILLER
4300 First National Bank Building
Dallas, Texas 75202

JOHN R. VAUGHAN
WILLIAM T. LIFLAND
MARSHALL COX
80 Pine Street
New York, New York 10005

D. L. CASE
JACK PEW, JR.
4300 First National Bank Building
Dallas, Texas 75202
Attorneys for Respondents

January 16, 1980

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED 1

COUNTER-STATEMENT OF THE CASE 2

1. The shopping center claim 2
2. The Mid-County claim 6
3. The Park Plaza claim 7

ARGUMENT—

1. The application of *Brunswick* to the shopping center claim 8
2. The standard of review for jury verdicts 9

CONCLUSION 13

TABLE OF AUTHORITIES

Cases:

Admiral Theatre Corp. v. *Douglas Theatre Co.*, 585 F.2d 877 (8th Cir. 1978) 11

Boeing Co. v. *Shipman*, 411 F.2d 365 (5th Cir. 1969) 2n, 9, 12, 13

Brady v. *Southern Ry.*, 320 U.S. 476 (1943) 10

Brunswick Corp. v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977) 5, 8

Coffy v. *Multi-County Narcotics Bureau*, 600 F.2d 570 (6th Cir. 1979) 11

Columbia Metal Culvert Co. v. *Kaiser Aluminum & Chemical Corp.*, 579 F.2d 20 (3d Cir.), *cert. denied*, 439 U.S. 876 (1978) 11

PAGE

Fontana Aviation, Inc. v. *Beech Aircraft Corp.*, 432 F.2d 1080 (7th Cir. 1970), *cert. denied*, 401 U.S. 923 (1971) 11

Galloway v. *United States*, 319 U.S. 372 (1943) 12
Gehrhardt v. *General Motors Corp.*, 581 F.2d 7 (2d Cir. 1978) 10

Lavender v. *Kurn*, 327 U.S. 645 (1946) 12, 13

Martin v. *Phillips Petroleum Co.*, 365 F.2d 629 (5th Cir.), *cert. denied*, 385 U.S. 991 (1966) 9
Millers Mutual Insurance Association v. *Southern Ry.*, 483 F.2d 1044 (4th Cir. 1973) 11
Molinar v. *Western Electric Co.*, 525 F.2d 521 (1st Cir. 1975) 10

Quichocho v. *Kelvinator Corp.*, 546 F.2d 812 (9th Cir. 1976) 11

United Telecommunications, Inc. v. *American Television and Communications Corp.*, 536 F.2d 1310 (10th Cir. 1976) 11

Vander Zee v. *Karabatsos*, 589 F.2d 723 (D.C. Cir. 1978), *cert. denied*, 99 S.Ct. 2407 (1979) 10

Constitution:

UNITED STATES CONSTITUTION, SEVENTH AMENDMENT 9

Other Authorities:

5A MOORE'S FEDERAL PRACTICE (2d ed. 1979)
¶ 50.02[1] 10
¶ 50.07[2] 12n

9 C. Wright & A. Miller, FEDERAL PRACTICE AND PROCEDURE, § 2526 (1971) 12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

79-931

LLOYD L. HAYES, HAYES, INC., PARK PLAZA TWIN THEATRES, INC. and MID-COUNTY ENTERPRISES, INC.,

Petitioners,

v.

T.G. SOLOMON, GULF STATES THEATRES, INC., GULF STATES THEATRES OF TEXAS, INC. and FUQUA INDUSTRIES, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

Questions Presented

1. Whether, in this case in which petitioners do not challenge the Court of Appeals's holding that they failed to establish "preparedness," an essential element of their principal antitrust claim, the Court should grant the Petition to review the Court of Appeals's discussion of antitrust injury, a discussion which was in any event correct?

2. Whether, in the absence of any reasonable ground for belief that the result below would be changed, the Court should grant the Petition to decide whether the Court of

Appeals in its exhaustive review of the evidence properly applied "the substantial evidence or reasonable man test" for reviewing jury verdicts?

Counter-Statement of the Case

At trial petitioners asserted three separate claims: (1) "the shopping center claim," (2) "the Mid-County claim," and (3) "the Park Plaza claim." The Court of Appeals found that petitioners had failed to present "substantial evidence"* as to certain critical elements of the shopping center claim and the Mid-County claim and reversed with instructions to dismiss those claims. The Park Plaza claim was remanded for a new trial.

Petitioners do not quarrel with any fact set out in the exhaustive review of the evidence in the opinion of the Court of Appeals (597 F.2d at 961-72; App. 4-26). It is therefore unnecessary to restate in detail the facts set out in that opinion. The holdings of the Court of Appeals are briefly stated below.

1. The shopping center claim

Before their acrimonious falling-out in April 1971, petitioner Lloyd L. Hayes ("Hayes") and respondent T. G. Solomon ("Solomon") had a close personal and business relationship. Hayes, then Mayor of Port Arthur, Texas, and Solomon, a New Orleans businessman, first came together in 1967. Hayes and another local investor had organized petitioner Park Plaza Twin Theatres, Inc. to build a theatre, and Solomon was engaged to operate that

* *I.e.*, "evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions." *Boeing Co.* v. *Shipman*, 411 F.2d 365, 374 (5th Cir. 1969).

theatre. After completing his term as Mayor in 1969, Hayes moved to New Orleans and became Solomon's assistant at his main office there. Solomon was grooming Hayes to succeed him and named Hayes executor of his will and trustee of a trust for his children. (597 F.2d at 961-62; App. 4-6)

In 1970, Hayes, his family corporation (petitioner Hayes, Inc.), Solomon and a third man (Wilbur Marvin) entered into a joint venture looking to the development of a shopping center on a 60-acre parcel of land owned by Hayes and Hayes, Inc. (597 F.2d 962-65; App. 7-13). After the falling-out and dissolution of the joint venture,* Hayes and Hayes, Inc. claimed that they proceeded on their own to develop a regional shopping center on the 60-acre parcel and would have commenced construction of a shopping center by September 1972, but for Solomon's alleged refusal to reconvey title to a one-half interest in the parcel obtained as part of the joint venture (597 F.2d at 967; App. 16).** They sought to recover as damages three-fold the increase in the hypothetical cost of constructing a hypothetical regional shopping center between September 1972 and the commencement of the trial on August 31, 1976. The construction of a shopping center on the 60-acre parcel had not begun at the time of trial (and has not since). Nonetheless, the jury awarded Hayes and Hayes, Inc. $3,000,000 before statutory trebling (597 F.2d at 969, 973; App. 21, 29).

Although petitioners nowhere refer to the fact, the reversal of the judgment below rested upon the determination

* Petitioners sought no damages for failure of the joint venture itself (597 F.2d at 974 n.7; App. 30 n.7).

** While Hayes and Hayes, Inc. had from March 1, 1972 a three-year option to buy back the one-half interest under a certain agreement dissolving the joint venture, it was not until the very last day, February 28, 1975, that they exercised the option (597 F.2d at 968-69; App. 19-20).

of the Court of Appeals that petitioners had failed to prove they were prepared to construct a regional shopping center in September 1972:

> "Plaintiffs cannot recover antitrust damages for the frustration of so ethereal a project. As we have already noted, before an antitrust claimant can recover for a frustrated attempt to enter a business, there must be a showing of preparedness to enter. Plaintiffs failed to introduce substantial evidence of their preparedness to construct the regional shopping center in September of 1972. It almost goes without saying that, if plaintiffs did not prove preparedness to construct the proposed shopping center, they did not prove preparedness to construct a theatre in that shopping center." (597 F.2d at 976-77; App. 35-36)

* * *

> "The parties are agreed that development of a regional shopping center is a very difficult undertaking. It involves, among a myriad of lesser undertakings, procuring tenants, arranging financing, and hiring an architect and a construction engineer. . . . After the shopping center joint venture fell apart in 1971, plaintiffs made no significant effort to develop a shopping center on their own. In February of 1972, Hayes solicited a proposal from Architectonics, Inc., and received virtually the same initial proposal the firm had provided the joint venture. The initial proposal went unanswered for several years." (597 F.2d at 974; App. 30)

* * *

> "Neither in 1972 nor at any other time did plaintiffs have commitments from prospective tenants, although tenant commitments were essential if any shopping center was ever to be built. Plaintiffs offered no evidence, except for Marvin's unsuccessful nascient efforts during the joint venture, that they or anyone on their behalf ever contacted potential shopping center tenants before trial. Plaintiffs did nothing to borrow shopping center construction funds and certainly expended none." (597 F.2d at 974; App. 31)

* * *

> "Hayes and Hayes, Inc. failed also to offer substantial evidence that they were capable of securing the money that would have been needed to build a shopping center, a sum their own experts said would exceed $14,000,000." (597 F.2d at 975; App. 32)

This holding and the facts underlying it are not challenged by the Petition.

Before setting out its holding as to preparedness, the Court of Appeals stated by way of introduction:

> "Plaintiffs Hayes and Hayes, Inc.'s shopping center claim is something of a Procrustean effort to apply the rubric of antitrust laws to an acrimonious falling-out between two close business associates. As such, plaintiffs' recovery on the shopping center claim is beyond the stretch of the antitrust laws. . . . We simply conclude that the underlying claim which plaintiffs established is not the type of injury that the federal antitrust laws were intended to forestall. *See Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.,* 429 U.S. 477, 487-88, 97 S.Ct. 690, 50 L.Ed.2d 701 (1977); *Conference of Studio Unions* v. *Loew's Inc.,* 193 F.2d 51, 54 (9th Cir. 1951), *cert. denied,* 342 U.S. 919, 72 S.Ct. 367, 96 L.Ed. 687 (1952). The basic reason for which the shopping center claim fails as an antitrust claim is that the injuries for which damages were awarded were not antitrust injuries." (597 F.2d at 972-73; App. 27-28)

It is this unexceptionable language which is challenged in Point I of the Petition. *See* pp. 8-9, *infra*.

2. The Mid-County claim

Petitioner Mid-County Enterprises, Inc. claimed that Solomon kept it from building a drive-in theatre in Port Arthur, Texas by threats to compete vigorously with the proposed drive-in and to drive it out of business if it were ever built (597 F.2d at 977; App. 36). On that claim the Court of Appeals ruled:

> "We once again voice our general reluctance to undo a jury verdict, but we cannot find substantial evidence in this record that the alleged conduct was a material and proximate cause of the abandonment of the drive-in." (597 F.2d at 977; App. 36)
>
> * * *
>
> "We hold that plaintiff Mid-County Enterprises, Inc., did not prove by substantial evidence that the defendants' alleged antitrust misconduct materially contributed to abandonment of the proposed drive-in theatre. The evidence permits but two conclusions about the proposed drive-in theatre: first, the threats from Solomon did not in fact materially contribute to the decision not to go forward with the proposal, and second, by July of 1974, when Mid-County Enterprises, Inc. claimed to have been forced to abandon the project by Solomon it had devoted most of the funds borrowed for construction to other unrelated pursuits. Under these circumstances, defendants' acts were not a material proximate cause of the proposal's failure, and judgment must be for defendants." (597 F.2d at 978-79; App. 39)
>
> * * *

> "After reading the record, we hold that plaintiffs did not prove by substantial evidence that any act on the part of the defendants materially contributed to the decision to abandon the drive-in theatre project. Therefore, we reverse and remand with instructions to the District Court to dismiss the Mid-County Enterprises, Inc. claim." (597 F.2d at 981; App. 43)*

3. The Park Plaza claim

Petitioner Park Plaza Twin Theatres, Inc. claimed that, while its Park Plaza Twin Theatre was under lease to respondents, they upgraded competing theatres owned by them and downgraded the Park Plaza Twin Theatre to eliminate competition from it. (597 F.2d at 971-7; App. 24-26). The Court of Appeals reversed and remanded for a new trial of the Park Plaza claim because of "the very real likelihood that the jury may have utilized an unproven or improper theory of liability to reach its verdict" (597 F.2d at 985; App. 53).

---

* The Court of Appeals, in its review of the evidence, commented on certain purported minutes of a meeting on July 19, 1974 of the Board of Directors of Mid-County Enterprises, Inc. upon which petitioners placed principal reliance below:

> "After Mid-County Enterprises, Inc. ran out of funds, its shareholders apparently decided to create a record that Solomon, rather than they, bore responsibility for abandonment of the project.
>
> * * *
>
> "These minutes, although dated before litigation, were apparently prepared just before the lawsuit was filed in August of 1975 and entered *nunc pro tunc*. . . . Mid-County Enterprises, Inc. has never disputed defendants' charge that these minutes were part of the preparation of plaintiffs' lawsuit for use at trial. For these reasons, we cannot give the minutes substantial credence." (597 F.2d at 979-80; App. 41-42)

Argument

Neither argument advanced in the Petition as to why the Court of Appeals was in error, even if accepted by the Court, would alter the result reached below.

1. The application of *Brunswick* to the shopping center claim

The short answer to the claim that the Court of Appeals misapplied the Court's decision in *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), in reversing the shopping center claim is that the Court of Appeals's discussion of *Brunswick* is unexceptionable. The trade or commerce alleged to have been restrained or monopolized by the antitrust violations charged was "the motion picture exhibition business in the greater Port Arthur, Texas area" (597 F.2d at 960; App. at 3). Yet Hayes and Hayes, Inc. did not seek damages for profits lost or other injuries suffered because of foreclosure of opportunities to exhibit motion pictures; their damage claim was for possible changes in the cost of building department stores, shoe stores, jewelry stores, and whatever else might be found in a regional shopping center. These entities and the cost to build facilities to house them are unrelated to motion picture exhibition. If any injury resulted from what the evidence showed to be "an acrimonious falling-out between two close business associates" (597 F.2d at 972; App. at 27), it was not antitrust injury and redress had to be had under state law, if at all.

In any event, the ground for the Court of Appeals's decision is not challenged here and the *Brunswick* argument need not be addressed by the Court. The Court of Appeals reversed the shopping center claim because no substantial evidence was submitted to the jury as to the preparedness of Hayes and Hayes, Inc. to construct a regional shopping

center in September 1972. Petitioners cannot and do not dispute either that preparedness must be shown or that there are particular elements of preparedness which must be demonstrated. *See Martin* v. *Phillips Petroleum Co.*, 365 F.2d 629 (5th Cir. 1965), *cert. denied*, 385 U.S. 991 (1966).

2. The standard of review for jury verdicts

Petitioners claim that the Seventh Amendment required the Court of Appeals to apply a different standard for reviewing evidence. However, the standard that the Court of Appeals applied (and which is nowhere mentioned in the Petition) is fully consistent with the Seventh Amendment. Enunciated in *Boeing Co.* v. *Shipman*, 411 F.2d 365, 374-75 (5th Cir. 1969) (*en banc*), and applied here (597 F.2d at 972; App. 26-27), that standard is:

> "On motions for directed verdict and for judgment notwithstanding the verdict the Court should consider all of the evidence—not just the evidence which supports the non-mover's case—but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper. On the other hand, if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied, and the case submitted to the jury. A mere scintilla of evidence is insufficient to present a question for the jury. The motions for directed verdict and judgment n.o.v. should not be decided by

> which side has the better of the case, nor should they be granted only when there is a complete absence of probative facts to support a jury verdict. There must be a conflict in substantial evidence to create a jury question. However, it is the function of the jury as the traditional finder of the facts, and not the Court, to weigh conflicting evidence and inferences, and determine the credibility of witnesses."

This standard, "the substantial evidence or reasonable man test," applies equally to appellate review of judgments entered on jury verdicts, to district court review of such verdicts on motions for judgments n.o.v., and to district court consideration of motions for directed verdicts. Despite some differences in wording, this Court and all ten other Circuits have endorsed the same standard as the court below. *See* 5A Moore's Federal Practice ¶ 50.02[1] at 50-25-50-27 (2d ed. 1979); *Brady* v. *Southern Ry.*, 320 U.S. 476, 479-80 (1943); *Vander Zee* v. *Karabatsos*, 589 F.2d 723, 726 (D.C. Cir. 1978), *cert. denied*, 99 S.Ct. 2407 (1979) (" 'Unless the evidence, along with all inferences reasonably to be drawn therefrom, when viewed in the light most favorable to the plaintiff is such that reasonable jurors in fair and impartial exercise of their judgment could not reasonably disagree in finding for the defendant, the motion must be denied' "); *Molinar* v. *Western Electric Co.*, 525 F.2d 521, 531 (1st Cir. 1975) *cert. denied*, 424 U.S. 978 (1979), *quoting Brady* v. *Southern Ry.*, 320 U.S. 476, 479 (1943) (" 'the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict' "); *Gehrhardt* v. *General Motors Corp.*, 581 F.2d 7, 14 (2d Cir. 1978) (" 'if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment

might reach different conclusions, the motions should be denied' "); *Columbia Metal Culvert Co.* v. *Kaiser Aluminum & Chemical Corp.*, 579 F.2d 20, 25 (3d Cir.), *cert. denied*, 439 U.S. 876 (1978) ("the question is whether sufficient evidence has been introduced, when viewed in the light most favorable to the plaintiff and allowing all reasonable inferences in its behalf, to allow a jury to find that relief is warranted") (antitrust case); *Millers Mutual Ins. Ass'n* v. *Southern Ry.*, 483 F.2d 1044, 1046 (4th Cir. 1973) ("The test is whether, viewing the evidence in the light most favorable to plaintiff, we find 'substantial evidence supporting the verdict' "); *Coffy* v. *Multi-County Narcotics Bureau*, 600 F.2d 570, 579 (6th Cir. 1979) ("The standard to be applied in determining the propriety of a grant or denial of a directed verdict is whether the evidence is such, without weighing the credibility of the witnesses or considering the weight of the evidence, that there is substantial evidence from which the jury could find in favor of the party against whom the motion is made"); *Fontana Aviation, Inc.* v. *Beech Aircraft Corp.*, 432 F.2d 1080, 1084 (7th Cir. 1970), *cert. denied*, 401 U.S. 923 (1971) ("We are not weighing the evidence but only inquiring as to whether there is any substantial evidence which would support a verdict") (antitrust case); *Admiral Theatre Corp.* v. *Douglas Theatre Co.*, 585 F.2d 877, 883 (8th Cir. 1978) ("to avoid a directed verdict 'the facts and circumstances relied upon must attain the dignity of substantial evidence and not be such as merely to create a suspicion' ") (antitrust case); *Quichocho* v. *Kelvinator Corp.*, 546 F.2d 812, 813 (9th Cir. 1976) ("the correct test is whether or not, viewing the evidence as a whole, 'there is substantial evidence present that could support a finding, by reasonable jurors, for the nonmoving party' "); *United Telecommunications, Inc.* v. *American Television and Communications Corp.*, 536 F.2d 1310, 1315 (10th Cir. 1976) ("a directed verdict is

granted 'only where the evidence and all the inferences to be drawn therefrom are so patent that minds of reasonable men could not differ as to the conclusions to be drawn therefrom' ").*

The Petition does not really urge a different standard. It urges that jury verdicts may not be overturned when they are "supported by probative facts and reasonable inferences from those facts" (at 21). This is the "substantial evidence" standard applied by the court below stated in other words. Differences in the wording chosen to define the standard do not rise to the level of a constitutional issue under the Seventh Amendment.

> "Whatever may be the general formulation, the essential requirement is that mere speculations be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked. The mere difference in labels used to describe this standard, whether it is applied under the demurrer to the evidence or on motion for a directed verdict, cannot amount to a departure from 'the rules of the common law' which the [Seventh] Amendment requires to be followed." *Galloway* v. *United States,* 319 U.S. 372, 395-96 (1943).

Petitioners misread *Boeing* in suggesting that their standard is the "FELA" standard held inapplicable in *Boeing.* The *Boeing* court apparently believed that one of many FELA cases, *Lavender* v. *Kurn,* 327 U.S. 645, 653 (1946), held that a mere scintilla of evidence was enough to create a jury issue in that case, *see* 9 C. Wright & A. Miller, FEDERAL PRACTICE AND PROCEDURE § 2526 at 556 (1971);

---

* The standards for motions for a directed verdict and motions for judgment n.o.v. are the same. 5A MOORE'S FEDERAL PRACTICE ¶ 50.07[2] at 50-76 (2d ed. 1979).

the *Boeing* court properly declined to apply a "scintilla" standard in the case before it. 411 F.2d at 370, 373. Whether the *Boeing* court was correct in regarding the "scintilla" standard as the *Lavender* or "FELA" standard is irrelevant here. The relevant point is that the standard *Boeing* adopted and the court below applied is not different from that petitioners assert is proper.

Petitioners' concern is not with the standard applied by the Court of Appeals in reversing the district court's judgment. Under petitioners' proposed standard (Petition at 21), the same result would have followed—because of the absence of "probative facts and reasonable inferences from these facts" to support key elements of their allegations.

CONCLUSION

The Petition should be denied.

Respectfully submitted,

Of Counsel:

CAHILL GORDON & REINDEL
80 Pine Street
New York, New York 10005

JACKSON, WALKER, WINSTEAD, CANTWELL & MILLER
4300 First National Bank Building
Dallas, Texas 75202

JOHN R. VAUGHAN
WILLIAM T. LIFLAND
MARSHALL COX
80 Pine Street
New York, New York 10005

D. L. CASE
JACK PEW, JR.
4300 First National Bank Building
Dallas, Texas 75202
Attorneys for Respondents

January 16, 1980